In the Supreme Court of the United States,

OCTOBER TERM, 1903.

THE UNITED STATES AND THE KIOWA INDIANS, *Appellants*,
vs.
JUAN B. MARTINEZ, Administrator of the estate of JULIO MARTINEZ, deceased.
No. 170.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The Act of March 3, 1891, entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations" (Suppl. R. S., Vol. 1, Sec. Ed., p. 913), provides in Section 2—

> That all claims existing at the time of the taking effect of this act, shall be presented to the court by petition, as hereinafter provided, within three years after the passage hereof, or shall be thereafter forever barred.

The appellee, within the time provided by this act,

brought his suit in the Court of Claims, averring that the depredation was committed by Indians belonging to the Ute tribe.

In the taking of the testimony, it developed that the depredation was committed by Indians belonging to the Kiowa tribe.

A motion to amend by the substitution of the Kiowa tribe as defendants was made after the expiration of the three years; it was allowed, the defendants' plea in bar being overruled, and judgment was awarded against the United States and the Kiowa Indians.

Seven years prior to the award of this judgment, namely on June 15, 1896, in the case of Duran *vs.* U. S. *et al.* (31 C. Cls., 353), the exact question was considered and the identical amendment permitted.

The appellants seek to distinguish the case at bar from the Duran case with the statement that in the latter the misjoinder was an error on the part of claimant's attorney. While that is true, that fact was not the reason for the decision of the Court permitting the amendment.

It is further sought to distinguish the Duran case from this, in the suggestion that in the Duran case, if a plea of misjoinder or non-joinder had been filed at the commencement of the litigation, the claimant could have discontinued and brought an action against the real defendants; and it is said in the appellant's brief that whatever the merit of that argument in the Duran case, where evidence had been taken and filed in the Department of the Interior before the commencement of the action in the Court of Claims, it can have no possible application to this case. But that is by no means clear, for it is not the filing of an application in the Interior Department, but the filing of a petition in accordance with the Act of March 3, 1891, that establishes the Court's jurisdiction. The mere fact that the claim was differently presented to the Department of the Interior, and that evidence filed there in support of it established the

the claim as there made, does not extend the Court's jurisdiction beyond the subject-matter of the petition. So that it is not material to the present consideration that there is this difference between the case at bar and the Duran case. The cases are in all other particulars identical.

In this connection it is said by the appellants in their brief that from the very nature of the case it is one in which the facts were peculiarly within the knowledge of the claimant, and that the United States, having no actual knowledge of the occurrence, cannot be charged with such knowledge. As to the facts of the owuership of the property and its loss, and the time and place of the loss, the facts were peculiarly within the knowledge of claimants; but when we consider which had the better means of information as to the identity of the Indians, the statement that such knowledge was peculiar to the claimant cannot for a moment be entertained. To the contrary, it is evident that the United States, having agents located all over the territory occupied by Indians, and having troops posted at various points throughout that territory, was in far better position to determine what particular Indians committed a depredation at a given time and place than individual citizens, often strangers in the locality where the depredation was committed, or suffering their depredations by night or in stealthy raids.

The appellee relies confidently upon the reasoning in the opinion in the case of Duran (*supra*), and will cite, under appropriate headings, the pertinent statements of that opinion.

THE DEFENDANTS AT FAULT AND THE OBJECTION TECHNICAL.

Not only is it a fact that the objection is technical, but also that the United States, by its failure to promptly plead is as fully responsible for the misjoinder as the claimant.

It will not be denied that in the defense of cases of this kind the defendants have not pleaded within the time provided by law. By section 4 of the act under consideration it is provided that the Attorney General shall appear and defend the interests of the Government and of the Indians in the suit, and within sixty days after the service of the petition upon him (unless the time shall be extended by order of the Court made in the case) shall file a plea, answer or demurrer on the part of the Government and the Indians. There having been filed almost eleven thousand cases, it was manifestly impossible for the Attorney General to make his appearance and plead within sixty days from the date of the filing of the petition. It has, therefore, grown to be the practice to permit the defendants to file a plea at any time.

The proof in this case was not completed until after the expiration of the statutory period in which new suits might be filed. Then the defendants filed a plea in bar, setting up the misjoinder. If such plea had been filed before the expiration of the statutory period the claimant could have amended, of course, and made the proper parties defendants.

For the same reason that the Attorney General could not file his pleadings within sixty days, the claimant was unable to take his testimony promptly; that is to say, the Attorney General's office was not provided with assistants in such number, and with facilities so great, that prompt response could be made to a notice to take testimony. It resulted that the claimant did not know, prior to the expiration of the statutory period, what his proof would disclose, as to the identity of the depredators.

It is thus seen that the necessities of the Government, and its inability to proceed promptly with its pleadings and with the taking of testimony, contributed as much as anything else, probably more, to the inability of the claimant to name the proper parties defendant prior to the expiration of the three years.

Upon this point, in the case of Duran (*supra*), the Court of Claims says:

> Tested by the practice of the Courts of common law, both parties are in fault. There a defendant would have had to file his plea of misjoinder or non-joinder of parties at the threshold of the litigation, and the plaintiff would have then discontinued and brought a second action against the right defendants. Here the defendants pleaded the general issue and raised the objection after it was too late for the claimant to bring a second suit (31 C. Cls., 355–6).

It must be manifest that the objection is purely technical, because the United States and the Indians are put to no disadvantage by an amendment made after the statutory period. This is said upon the theory, hereinafter presented, that the Indians are not necessary parties defendant to suits of this character.

In this connection, much stress is laid by the defendants upon the fact that the Indians have the right to appear by attorneys of their own selection. It is true that the law so provides; but it is also true that an attorney, seeking to contract with a tribe of Indians for their representation in this jurisdiction, must proceed in accordance with Section 2103 of the Revised Statutes; and the defendants will admit that that clause of this act is a dead letter, because the Secretary of the Interior, under a real or imagined authority, has refused time and again to give his approval to such contracts. For more than three years, but one tribe of Indians has been permitted by the Secretary to appear by an attorney, and even that tribe is now denied such representation.

WHETHER THE TRIBE IS A NECESSARY PARTY TO THE SUIT.

By Section 4, of the act, it is provided that the service of the petition shall be made upon the Attorney General of the

United States. There is no provision for service upon the tribes. It is not necessary even that the claims should ever have been presented to the tribes. (Kemp *vs.* U. S., No. 4777, C. Cls.)

The following provisions of the act make it manifest that the tribes are not necessary parties:

> Section 3. That all claims shall be presented to the Court by petition setting forth in ordinary and concise langugage, without unnecessary repetition, the facts upon which such claims are based, the persons,. classes of persons, tribe or tribes, or band of Indians, by whom the alleged illegal acts were committed, *as near as may be.*

> Section 5. That the Court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction, and, *if possible, the tribe of Indians* or other persons *by whom the wrong was committed,* and shall render judgment in favor of the claimant or claimants against the United States and against the tribe of Indians committing the wrong *when such can be identified.*

These provisions of the act have been construed in opinions which have been long acquiesced in by the appellants.

Upon this point the Court of Claims said, in the case of Duran (*supra*):

> The statute does not in terms make an Indian tribe a necessary defendant. All that it requires in terms is that the petition shall set forth "the facts upon which such claims are based, the persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged illegal acts were committed, as near as may be, the property lost or destroyed and the value thereof, and any other facts connected with the transaction and material to the proper adjudication of the case involved." It is manifest that the general purpose of this section is to secure a declaration setting up every known fact which may be of benefit to the defendants, the United States, and

> facilitate their defense. Instead of a formal requirement that every suit shall be *ab initio* against the proper Indian tribe, the Court must gather by implication the statutory intent that the Indian tribe known to be responsible for the depredation is a necessary party defendant in a suit against the United States. And instead of the express requirement that the proper Indian defendant shall be named in the petition, it is merely prescribed that the persons, the tribe, or the band by whom the depredations were committed shall be set forth "as near as may be." (31 C. Cls., 357–8.)

The Court, continuing, declares, upon the authority of numerous decisions of the Court of Claims, that a petition is both process and declaration. By the second section of the act the petition is referred to as "process," and by the third section as a "declaration." The Court says further:

> Consequently, a defect in any matter required by Section 3 may be a matter of amendment, and a strict compliance with the requirements of Section 3 cannot be regarded as conditional to jurisdiction (*Ibid*, 359).

The opinion cites the case of Cowan (5 C. Cls., 107) showing that from an early point in its history the Court has been accustomed to permit such amendments. The opinion makes a comparison between this case and that of Cowan in these words:

> Both actions were brought within a fixed jurisdictional period; the defendants raised no objection until after the jurisdictional period had expired; the mistake was one of parties. On the other hand, there are two differences which are radical: The mistake in the former case was one of law; in the present, one of fact. In the former, the right defendants were sued within the prescribed time; in the latter, they have not been brought within the jurisdiction of the Court. The Cowan case is cited now merely as a declaration of the principle that

> where suits must be brought within a fixed jurisdictional period the Court will not allow a meritorious cause of action to fail because of a mistake of parties or attorneys, if it can be saved by amendment. This principle, so declared in the abandoned or captured property cases, was never departed from and was never disapproved by the Supreme Court. (*Ibid*, 359–60.)

Reference is made also to the case of Thomas (15 C. Cls., 335), where this principle was carried still further in application, and where all the casas on the subject are cited and rèviewed.

Finally it is said by the Court in the Duran case:

> The purpose of the statute was that a suit should be brought within three years; that the cause of action should be definitely described so that the defendants should be apprised of what the claim is, of the place where it originated, of what the property destroyed consisted and by whom the depredation was committed "as near as may be," and that when a suit is so brought and its cause of action so defined the case is subject to all the powers of amendment which a court can exercise in other actions in furtherance of justice. (*Ibid.*, 360.)

Other cases not referred to in this opinion have more or less bearing upon the question under consideration.

In the case of Gorham, it was found that the depredation was committed by Indians whom the evidence did not identify. A judgment was entered against the United States alone. In that case the Court of Claims declared that—

> Judgment against an Indian tribe is not a necessary condition to judgment against the United States in an action under the Indian depredation act of 1891 (29 C. Cls,. 97).

That case was brought to the Supreme Court of the United States, where it was affirmed, the Court declaring that judgment "may be rendered against the United States

alone when the tribe of Indians to which the depredators belonged cannot be identified, and such inability is stated." (Gorham *vs.* U. S., 165 U. S., p. 316).

In the case of Graham, where the claimant had brought his action against the "Sioux Indians," the Court of Claims held that the Sioux Nation, comprising, as it did, very many distinct bands, was not suable in that name, but that a suit against the "Sioux Indians" comprehended all its independent bands, and that, after the expiration of the statutory period, the Court, of its own motion, would so amend its judgment as that it might run against the particular band of the Sioux whose members were shown to have committed the depredation. (Graham *vs.* U. S. *et al.*, 30 C. Cls., 318).

In the case of Wolverton, the Court declared that there were two classes of cases where the United States was responsible; first, where the Indian defendants are responsible but without funds to respond in damages; and second, where the depredations were committed by Indians whose tribal relations cannot be ascertained. (Wolverton *vs.* U. S. *et al.*, 29 C. Cls., 107).

From all these decisions, it seems that it ought to be very well settled that Indian tribes are not necessary parties defendant. It is true it is the duty of a claimant to name the tribe whose members committed the depredations, as near as may be, that is, if he can do so; but the mere statement of the condition necessarily establishes the inference that if he fail in his attempt to correctly state the tribe, the tribe really guilty may be identified at any time.

It is true that it is the duty of the Court to ascertain the tribe and to include it in its judgment, if it can do so; but it has been authoritatively settled, as we have shown, that if it cannot do so, then judgment may be rendered against the United States alone. *Now if, in any case, a judgment can be rendered against the United States alone, it would seem necessarily to follow that in no case is the tribe of Indi-*

ans a necessary party defendant, to be named as such in the petition; for the obvious reason, that if, in any one case, a tribe is not a necessary party defendant, that must be true of all cases. There is no distinction made in the act. The object of the requirement to name the tribe, if it can be done, is that the Court may identify and include it in its judgment.

In this connection, the appellants suggest that by whatever process the Court may acquire jurisdiction "it is essential that all the parties be properly before the Court before judgment can be rendered." This statement entirely ignores the fact that no service of process whatever is made upon Indian tribes, and that in the Indian depredations act, we have provisions absolutely without precedent. In no other jurisdiction, and under no other law, can parties be made defendants to a suit without notice of its institution. The right or power of Congress to authorize a judgment against an Indian tribe without the service of process, is a necessary consequence of the decision of this honorable Court in the case of Lone Wolf (187 U. S., 553). It was an instance of the exercise of such authority, when Congress, by the Act of March 3, 1891, provided for judgment against Indian tribes without notice to them. The fact that notice was not to be given them is an unanswerable argument to show that the tribes are not necessary parties.

We cannot agree with the appellants that their proposition is not negatived by the decision in the case of Graham (*supra*), because it was there held that the petition charging the Sioux Nation of Indians brought into Court every band of that nation, when as a fact those bands were maintained on reservations hundreds of miles apart, were parties to different treaties, received rations, annuities and other payments which were not at all uniform, and in all other particulars existed as independent tribes or bands.

THE WORDS "AS NEAR AS MAY BE," "IF POSSIBLE," AND "WHEN SUCH CAN BE IDENTIFIED."

As herinbefore shown, the petition is to describe the band of Indians "as near as may be," and the Court is to determine the tribe "if possible," and to award a judgment against the United States and against the Indians, "when such can be identified."

No unwarrantable liberty is taken in the statement that with many tribes of Indians inhabitating the same localities, and with depredations committed, generally at night, or stealthily, claimants in many cases could not be expected to positively identify the tribe to which the depredating Indians belonged. And in the prosecution of such cases, claimants have depended for proof of the identity of the Indians, either on the locality, it being one where but one band was accustomed to commit depredations, or upon the circumstance of finding a moccasin peculiar to a tribe, or a quirt, or a dogwood arrow such as the Comanches used, or a tule arrow such as the Apaches used, or a pony with ears split, bearing a peculiar brand known to be the brand of a certain tribe. It was, therefore, very reasonable that the law qualify the requirement of naming the Indians as defendants by the use of the words "as near as may be." That was not at all because it was necessary to have an Indian tribe as defendant; but, as we have said, solely for the purpose of enabling the Court to identify the tribe, if possible, so as to charge the judgment against its funds. Now if the claimants are to charge the Indians "as near as may be;" if they are placed under the duty of identifying the Indians from their best information, it must result that positive identification is not necessary; and that the Court has the authority, whenever it awards its judgment, to award it against the Indians shown to have been actually guilty.

It is suggested by the appellants that there is nothing in

the record to show that the claimant named the Indians in his petition as nearly as he could. Certainly the most reasonable presumption is that he did that. He could have had no possible object in naming a tribe as a defendant, unless he believed that the depredation was committed by members of that tribe.

The appellants seek to explain the use of the words "as near as may be," by calling to the attention of the Court the legislative history of the Act of March 3, 1891, with the statement, from that history, that the bill as originally drawn, was reciprocal in its provision for the adjudication also of claims by Indians against whites, and that the words "as near as may be," were intended to apply to other persons, that is to say, to white persons, and not intended to apply to Indians. Then occurs this remarkable statement in the appellant's brief:

> Now it can be readily seen that since it would be much easier for a white man to identify the tribe of Indians who committed the depredation upon his property than for an Indian to identify the individual white man or men who had wronged him, the language of Section 3, which requires such identification "as near as may be," is far more likely to have been intended to apply to the latter class of cases.

We say this statement is remarkable, because it would seem far easier, where the depredation was witnessed, for the Indian to show that a white man had committed the depredation, than for a white man who suffered a depredation in a country, for instance, where there were many tribes of Indians, or where he was a stranger, to show, not only that the depredators were red men, but also to identify the particular tribe whose members committed the depredation. A parallel would have been more nearly approximated, if the case of a claim by an Indian had been supposed, who should be required to show, not only that the wrong-doer was

white, but whether he was a Dutchman, an Irishman, an Italian, a Frenchman, a Swede, a Pole, a Hungarian, a "down easter," a "Georgia cracker," or an inhabitant of some section, or one of some particular nationality, with none of whom had the Indians less acquaintance than had the average white man with the distinctive features, dress and equipments of the numerous tribes.

If, in the act as at first proposed, the words "as near as may be" applied to both white men and Indian tribes, the removal of the provision as to suits against white men certainly did not affect the application of the words "as near as may be" to tribes of Indians. As entirely corroborating this statement is the subsequent direction of the act in Section 5, that the court shall, "if possible," name "the tribe of Indians," and render judgment against "the tribe of Indians, when such can be identified."

The appellants say, however, that it is possible to conceive that the depredation might have been committed by Indians whose tribe could not be identified, and that in such case the claimant would be entitled to recover against the United States alone. This is said from necessity, by reason of the opinion in the case of Gorham (*supra*). But the suggestion puts a premium on a refusal to attempt to identify the Indians and on disobedience to the mandate of the law that the claimant shall name them "as near as may be." Which claimant is entitled to greater consideration; which brings himself most fairly into court; the man who contents himself with the averment that he cannot identify the Indians, or the man who, attempting to identify them, does so, "as near as may be"?

The appellants would make light of the interpretation, by the Court of Claims, of the direction in the 5th section of the statute, that the Indians shall be named in the judgment, "when such can be identified." In this connection, the court says in the Duran case (*supra*), "If the tribe can-

not be brought in, how can judgment be rendered against it?" That seems to counsel to be a most pertinent inquiry.

In that section is a direction to the court to identify the tribe "if possible" and to include it in its judgment, when it can do so. No condition is attached to this direction. It is important, therefore, to repeat the court's question, how can such judgment be rendered unless, under the act, the responsible defendants may at any time be brought into court?

Let us suppose that the claimant has averred in his petition that the depredators were unknown Indians; but that in the progress of the cause their identity is developed; shall the court, charged to name the guilty Indians in its judgment, if possible, ignore the evidence on identity merely because the tribe really guilty was not made a party, and render judgment against "unknown Indians," merely because the petition stated that they were unknown? Shall it dismiss the suit because the claimant, alleging that the Indians were unknown, has nevertheless established their identity? Or shall it have regard to the evidence on identity, and to the direction of the act, and advise Congress, by its judgment, who the guilty parties were? If such is its duty, then certainly an amended petition should be permitted naming the real defendants.

It is true that this might be a "peculiar argument," if advanced "in any other case where the statute of limitations was under discussion." But as we have said, we have a law in the Act of March 3, 1891, unlike any other law that ever has been enacted; and most probably unlike any other law that ever will be enacted; a law, justified, as this court itself has practically declared, by reason of the peculiar relations we sustain to Indian tribes; a law, justified in all its particulars, and in more, by the promise of indemnification made by the United States since the year 1796; a law which is not attacked by the defendants because it omits the provisions (vital in all other jurisdictions and against all other defend-

ants) for service of process upon the defendants. Surely this suggestion does not need further elucidation.

The appellants say further in criticism of the statement in the Duran opinion, that "It is manifest that a claim is filed so as not to be barred by the statute, when the petition is filed," that "the authorities cited in support of the suggestion, relate to cases (with one exception) where the United States is the sole defendant." The author of the brief has overlooked the case of Garcia *vs.* the United States and Apache Indians, (37 C. Clms. 243), in which the court held that a suit brought in the name of one partner as the sole owner, might be amended after the expiration of the statutory period, by the bringing in of the other partners, so that they might participate in the judgment.

The defendants acquiesced in this decision.

It would seem that if new parties claimant might be made after the expiration of the statutory period, there might by parity of reasoning, be new parties defendant. The theory of the decision in the Garcia case was that the filing of the petition effected the presentation of the entire claim. That is one of the theories on which this decision is based. If in the Garcia case by admitting new parties claimant, the Indians had to pay the claim of *all* the partners, when, but for the amendment, they would have had to pay but one-third the claim, surely there was as much ground for complaint as in this case, where by an amendment upon exactly the same theory (without regard to other reasons) guilty Indians are made to pay a claim presented duly and in accordance with the law, to their guardian. If anything repugnant is to be found in the decision in the case at bar, something equally repugnant is to be found in the decision in the Garcia case. It offends no more the sense of justice that, as the result of amendment, a tribe should have to pay a claim for which, under the original proceedings it could not have been mulcted, than that by the same process it should be compelled to pay three times

as much as it would have been liable for, under the original pleadings.

In attempting to convince the Court that there may be some dire consequences, if the decision of the Court in the Duran case be followed, the appellants again refer to the right of the Indians to appear by attorneys and defend a suit brought against them. It is asserted that this is a substantial privilege, and that in some instances the defenses of the tribe could not be fairly offered because they might present some claim opposed to the interests of the United States. The appellants have taken the liberty to make statements to the Court to the effect that various tribes have availed themselves of the right to defend by their own attorneys, aud that as to two tribes, every case in which they were made parties defendant during the term provided by the statute has fallen under the scrutiny of competent attorneys employed solely for the purpose of defending the interests of these tribes. Admitting that such is the case as to claims against the Utes and Osages, and availing himself of the liberty thus invited to be taken, counsel would state to the Court that the Kiowas and Comanches, the Cheyennes and Arapahoes, the Sioux, the Apaches, the Indians of Washington, Oregon and California, against whom, perhaps, nineteen-twentieths of all the eleven thousand cases filed in this jurisdiction have been brought, have either not been represented by attorneys or have appointed attorneys whose contracts for their representation the Secretary of the Interior has persistently refused to allow; and, therefore, that in the great majority of the cases there has never been any separate representation of the Indians. Counsel also states further that in the course of the prosecution of, perhaps, one-third the total number of cases filed, an instance has never come under his observation, nor has he ever heard of an instance, where the interests of the United States have conflicted with the proper representa-

tion, by the attorneys of the United States, of the Indian tribes.

Another of the consequences which the appellants' counsel suggests is that by permitting amendments of this character, substituting the tribe which should be the real defendants, unprincipled men may make an effort to prove the guilt of a different tribe than that alleged in the original petition. The suggestion ignores the fact that this is a matter for proof, not of pleading; and it ignores also the decision of the Court in the case of Johnson *vs.* the United States (35 Ct. Cls., 552), where the opinion declares that if, after a claimant has testified to a given date which by a subsequent finding of the Court falls within a period of hostility, a re-examination be had of the claimant or of his witnesses for the purpose of proving a different date falling within a period of amity, the Court will decline to consider the evidence tending to establish the latter date. Such decision is, of course, applicable to a change of tribes made upon similar inducement, and it has been many times so held.

Counsel may be permitted to conclude this brief with a statement of two typical cases now pending in the court of Claims, which illustrate the reasonableness of the positions taken in this brief:

Three families from Arizona, emigrating to California, were attacked at night in the neighborhood of Fort Hall, Idaho. Their outfit was taken and eight of the party killed by the Indians. (Dykes *vs.* U. S., No. 10656, C. Cls.) The section in which this attack occurred was inhabited by Bannocks, Piutes, Shoshones, Snakes, and perhaps a half dozen other tribes, insignificant in numbers, but equally bent on the destruction of property. The claimants were strangers from a far land, would not have been able to identify the Indians had they been in clear view of them in broad daylight, could not in good conscience have inculpated all the

tribes, and, therefore, naturally imputed the depredation to the most populous tribe—the Bannocks; but no living man could, from the signs left at the place of the attack, or from the manner of the attack, or from its consequences, positively identify the tribe to which those Indians belonged.

The second case is this: In August, 1866, an Indian raid was made on the headwaters of the San Saba River in Texas. Forty-six cattle owners lost cattle in this raid. There was some discussion at the time as to the identity of the Indians. During this raid a man named Dawson heard the Indians cry out "Apaches." Dawson was acting as agent for six other persons whose cattle were being maintained on the same range and who lost cattle in the raid. A near neighbor of Dawson was another cattle owner, who, in addition to caring for his own cattle, was charged with the care of cattle belonging to five other owners. Ignorant himself of Indian dress and appearance and characteristics, and unable to distinguish them, he accepted the statement of Dawson, to whom the Indians shouted that they were Apaches, and in the petitions filed by these two persons for themselves, and as the representatives of those whose cattle they had in charge, being thirteen in all, it was averred that the depredating Indians were Apaches. One lone claimant averred that the Indians were Kickapoos. Twenty-nine other claimants averred that they were Comanches. It has since been shown that every sign found on the trail of the cattle, such as arrows, quirts, moccasins and ponies bearing a peculiar brand, indicated the presence of Comanches.

If this Court should hold that absolute and accurate identification, prior to the end of the three years, is necessary, and that amendments as to parties are not permissible after that time, the thirteen claimants who unquestionably suffered the loss of the cattle on the identical day, and at the hands of the same Indians, would fail to recover, while their

twenty-nine neighbors, *who made a better guess*, would recover for their losses.

It is inconceivable that it was the purpose of the lawmakers to exclude sufferers in either of these depredations, from a recovery, because they could not positively identify the tribe, or because of a difference of opinion on the subject of identity.

The Court of Claims and this Honorable Court have decided that when the Indian tribes are unknown, the claimants may recover against the United States alone; and we respectfully submit that the principle of that decision extends to the case at bar, and establishes, beyond reasonable question, that the amendment naming the tribe whose members were the guilty parties may be made at any time.

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Attorney for Appellee.